As regards the second charge, it was incumbent on the trial judge to consider the totality of the contents of the three statements, including the circumstances under which they were made by the appellant following on the arrest of the taxi-driver and the discovery of the five packets of diamorphine in the taxi. It is to be observed, had this been done, that the statement to Inspector Sukhdev Singh made after the taxi-driver had been committed to trial in the High Court was a more detailed statement than the first statement made by the appellant to the investigating officer, Sgt. Makhan Singh, and the statement tendered in evidence at the Preliminary Inquiry.

In the context of the ambush and the search of the taxi, which was beyond doubt conducted by the appellant and P.C. 8286, and the explanation given by the appellant at his trial the finding of the district judge that the appellant made an untruthful statement as to who discovered the diamorphine in his statement tendered in evidence at the Preliminary Inquiry cannot be sustained. While the latter statement may not be the whole truth, having regard to all the circumstances, there was in my judgment a reasonable doubt that the appellant had intentionally given false evidence as defined in section 191 of the Penal Code when in his latter statement he stated that "whilst searching the taxi, I discovered a polythene bag under the driver's seat". Accordingly, the conviction on the second charge must be set aside.

Order accordingly.

Solicitors: *Nathan Isaac & Co.*

HAW PAR BROTHERS INTERNATIONAL LTD. v. OVERSEAS TEXTILES CO. LTD.

MOSCOW NARODNY BANK LTD. v. HAW PAR BROTHERS INTERNATIONAL LTD.

[O.C.J. (Choor Singh J.) March 7, 1978]

[Singapore — Originating Summons No. 194 & 225 of 1977]

Practice and Procedure — Priorities as between landlord distraining for rent and debenture holders of company — Floating charge crystallised — Distress Act (Cap 20), s. 10.

Landlord and Tenant — Distraint for rent — Debenture holder of company — Priority.

The applicants were debenture holders of a company and had applied to court for the appointment of a receiver and manager of the company. The company was the tenant of premises belonging to the respondents. There was machinery and other movable property on the premises. The respondents applied to distrain the movable property for arrears of rent. The applicant subsequently applied to have the writ of distress discharged or suspended and for the release of the property distrained. The question was who had priority, the debenture holders or the landlords.

Held: (1) as between an execution creditor and a debenture holder who possesses a floating charge the execution creditor takes subject to the equity of the debenture holder. There is no authority to support the view that the rights of a landlord are greater than those of an execution creditor *vis-a-vis* a debenture holder. A landlord is an unsecured creditor as any other unsecured creditor and he cannot have against a debenture holder any better rights than an unsecured execution creditor;

(2) on the facts of this case the debenture holders have a prior right to the property distrained to the respondents.

Cases referred to:-

(1) *Re Roundwood Colliery Co.* [1897] 1 Ch. 373, C.A.

(2) *In re New City Constitutional Club Company* (1887) 34 Ch. D. 646.

(3) *In re Harper's Cycle Fittings Co.* [1900] 2 Ch. 731.

(4) *Re Standard Manufacturing Co.* [1891] 1 Ch. 627, at p. 641.

(5) *Re Opera* [1891] 3 Ch. 260.

(6) *Davey & Company* v. *Williamson & Sons Ltd.* [1898] 2 Q.B. 94.

(7) *Evans* v. *Rival Granite Quarries* [1910] 2 K.B. 979 at p. 1000.

(8) *Duck* v. *Tower Galvanizing Company Limited* [1901] 2 K.B. 314.

ORIGINATING SUMMONS.

Goh Heng Leong for the receivers.

A.B. Netto for Haw Par Brothers International.

Harry Elias for Banque Nationale de Paris (Debenture-holder).

Wong Meng Meng for Moscow Narodny Bank Ltd. (Debenture-holder).

Choor Singh J.: The point in issue to be determined in these two Originating Summonses which have been ordered to be heard together is whether the applicants as debenture holders have a prior right to the property of Overseas Textiles Company Limited which has been distrained upon by the respondents for rent due to them as landlords of the said Company.

The facts briefly are these. Haw Par Brothers International Limited (hereinafter referred to as respondents) are the landlords of Overseas Textiles Company Limited (hereinafter referred to as the Company). The Company has machinery and other movable property on the premises, Haw Par Industrial Building No. 2, Chia Ping Road, Jurong, Singapore, of which it is a tenant of the respondents under a lease for five years.

On May 20, 1977 the respondents were informed that a receiver and manager had been appointed of the Company on May 17, 1977 by debenture holders.

On June 23, 1977 the respondents made an *ex parte* application to the court in Originating Summons 194 of 1977 for liberty to distrain the movable property found on the premises at Building No. 2, Chia Ping Road, Jurong, Singapore, for the sum of $79,200 being the amount of five months rent due to them from the Company. An order in terms of the application was made by the Assistant Registrar on the same day. On June 24, 1977 a writ of distress was issued by the court and executed by the Sheriff on June 25, 1977 against the movable property of the Company found on the leasehold premises.

On July 6, 1977 the Banque Nationale de Paris, a debenture holder of the Company applied to the court for the writ of distress to be discharged or suspended and for the release of all the property distrained. A similar application was made in Originating Summons 205 of 1977 by the Moscow Narodny Bank Limited, another debenture holder of the Company.

On July 11, 1977 the court ordered that the writ of distress be suspended and all the property distrained

be released pending determination of the issue whether the landlord has a prior right to the receivers and debenture holders. On July 29, 1977 a similar order was made in Originating Summons No. 225 of 1977 directing that the issue be tried without pleadings, as to whether the debenture holders had a prior right to the landlord and that the applications in Originating Summons No. 225 of 1977 and the applications in Originating Summons No. 194 of 1977 be all tried together.

At the hearing before me counsel for the debenture holders submitted that when a floating charge has crystallized, the landlord cannot distrain and if he does, the debenture holder has priority. Counsel however was unable to submit any authority directly on the point. Counsel went on to emphasise that once a receiver is appointed the tenant is no longer the owner of the property; that the floating charge having crystallized the debenture holders were secured creditors and that a landlord is always an unsecured creditor in a winding up.

Counsel for the respondents relied almost entirely on the provisions of the Distress Act and finally cited *Kerr* on Receivers, page 322: —

"After the appointment of a receiver out of court, remedies of the landlord of leasehold properties belonging to the Company are unaffected; he can distrain or re-enter, if the rent is not paid by the receiver."

In my judgment, the answer to the point in issue cannot be found in the Distress Act. It does not lay down the test for priorities.

The passage from Kerr on Receivers is not supported by any authority. Kerr does not cite any reported decision in support of his opinion. There is a somewhat similar passage in *Gower* on Modern Company Law at page 423: —

"Once the charge crystallizes it will, of course, give the debenture holders a right to the property charged, free from the claims of the unsecured creditors... the debenture holders only take over the company's property subject to the right of anyone claiming by title paramount, so that a landlord can re-enter and can distrain on chattels in the leasehold premises if the rent is unpaid, notwithstanding that the chattels are comprised in a charge which has crystallized."

The case cited in support of the assertion that the landlord has a right to re-enter and distrain is *Re Roundwood Colliery Co.*[1] I have read this case very carefully and I find that it does not lend any support at all to Gower's aforesaid assertion. In that case it was held that the distress, having been levied before a receiver was effectively appointed on behalf of the debenture holders of the company, was valid against the debenture holders. What Gower states in the quoted passage is clearly unsupported by the authority on which he relies.

Counsel for the respondents also cited *In re New City Constitutional Club Company.*[2] In that case the Court of Appeal held that "as the charge of the debenture holders was more than the value of the furniture, the furniture did not belong to the company, and the landlord was therefore entitled to distrain upon it". Lindley L.J. observed: —

"...The goods in question were in one sense the goods of the company. But when we look at the facts of the case, it is clear that they were mortgaged to the debenture-holders for more than their value. Therefore, for all practical purposes, they were not the goods of the company. Consequently, as between the landlord and the debenture-holders the landlord is entitled to distrain. That is the main question on this appeal..."

The case of *In re Harper's Cycle Fittings Co.*,[3] was decided on the same principle. Wright J. held that as "the company has no interest in the property" the liquidator could not intervene and restrain the landlord from proceeding with the distress.

These cases, are however, of no help to the respondents. They were both decided before the passing of the Distress Amendment Act, 1908. Before the coming into force of this Act, the law in England was that whatever was found upon the demised premises, whether belonging to a stranger or not, could be seized by the landlord and sold to apply the proceeds to the payment of the rent. This state of affairs held out a great temptation to a landlord to take the goods of a stranger although he knew they were not of the tenants. This inequitable state of affairs was modified by the Law of Distress Amendment Act, 1908.

The *New City Constitutional Club Company* case and *Harper's Cycle Fittings Co.* case were both decided when the law allowed a landlord to seize and sell the property of a stranger found on the demised premises and they were decided quite clearly on the basis that as the goods seized were not the property of the Company the landlord had a right to distrain the goods. As the goods of the company, they could not be distrained by the landlord because a liquidator had been appointed in both cases before the distress was levied but as the goods of a third party, the debenture holders, they could be distrained under the law as it then stood.

Under our Distress Act (Cap. 20), a landlord can distrain the goods of the tenant only and has no right to seize the goods of a third party found on the demised premises. In the present case, the floating charge created in favour of the debenture holders having become crystallized by the appointment of a receiver and manager, the debenture holders have a right to the property charged free from all claims subject only to the right of anyone claiming by title paramount. The property on the demised premises which was distrained by the respondents comprises property charged in favour of the debenture holders and was for all practical purposes, on the day the distress was levied, the property of the debenture holders in the possession of the receiver and manager appointed by them. Under the circumstances it would appear that the respondents, as landlords, were not entitled to distrain it.

The only case in which the respective rights of a landlord and a debenture holder were discussed at length is *In re Roundwood Colliery Company,*[1] where the facts were these. On October 12, 1896, the lessor distrained and seized goods and chattels of the Company. On October 13, a resolution to wind up, passed on September 24 was confirmed and a liquidator was appointed. The winding-up of the Company commenced on that day. On October 14 a receiver was appointed in a debenture holders action and he proceeded to take possession of the property of the

Company. In dealing with the rights of the landlord to distrain, Lindley L.J. said, at page 392: —

"There remains the other point, the right to distrain as against the debenture holders of the company. The company had issued debentures in the ordinary form, and those debentures created what is called a floating charge on the goods and chattels of the company... It becomes necessary to consider the respective rights of the landlord and the debenture holders to the goods seized. These rights depend upon the question whether the landlord distrained while the debentures were still a floating security, or whether the debentures are to be regarded as having definitively attached to the goods seized, so that, as between the landlord and the debenture holders, those goods had become the property of the latter before the landlord seized them.

It is not contended that the landlord could distrain off the property demised on goods which were not the goods of the company, both at law and in equity. The debenture holders contend that the goods seized were not the goods of the company, except subject to the equitable charge created by the debentures. As between the debenture holders and the company this proposition is true; but it does not decide the respective rights of the lessor and the debenture holders, which is what we have to consider. The goods seized by the lessor were seized under a power conferred either before the debentures were issued or whilst they were clearly a floating security, and in either case that power could be exercised before the debentures ceased to be floating securities. They did not cease to be so before the distress was put in. The winding-up did not commence until after that date, nor was any effectual order for a receiver made until after the same date. The order of October 7 was never really effective. It was never drawn up, the lessor had no notice of it, and before the receiver could take possession he had to give security. The distress, having been made before the commencement of the winding-up of the company, and before a receiver was effectively appointed, was, in my opinion, valid as against the debenture holders."

In the present case the distress was levied eight days after the appointment of the receiver and manager and the decision in the *Roundwood Colliery Company* case is therefore inapplicable.

The rule that an execution creditor takes subject to all equities affecting the debtor is well established. See *Re Standard Manufacturing Co.*,[4] at page 641 (C.A.); *Re Opera.*[5] The cases show that as between an execution creditor and a debenture holder who possesses a floating charge, the execution creditor takes subject to the equity of the debenture holder. If the security becomes a fixed one before the goods are sold, the debentures will prevail. See *Davey & Company* v. *Williamson & Sons Ltd.*,[6] as explained in *Evans* v. *Rival Granite Quarries*,[7] at page 1000. The equities of the debenture holder entitle him to oust the sheriff after he has seized if the security has crystallized before he has sold. *Re Opera;*[5] *Duck* v. *Tower Galvanizing Company Limited;*[8] *Davey & Co.* v. *Williamson & Sons Limited.*[6]

There is no authority to support the view that the rights of a landlord are greater than those of an execution creditor, vis-a-vis a debenture holder. A landlord is as unsecured a creditor as any other unsecured creditor and he cannot have against a debenture holder any better rights than an unsecured execution creditor.

Counsel for the respondents submitted that as under the common law a landlord can seize and distrain for rent in arrear all goods found on the premises out of which the rent issues the receiver and manager in this case can only avoid the distress if he can bring himself within section 10 of the Distress Act (Cap. 20). The material provisions of the said section provide: —

"10.—(1) Where any movable property of —

(a) ....

(b) ....

(c) any other person... not being a tenant of the premises ...and not having any beneficial interest in any tenancy of the premises —

has been seized under a writ of distress issued to recover arrears of rent,... such other person aforesaid may apply to a judge to discharge or suspend the writ or to release a distrained article.

(2) No order shall be made unless such... other person aforesaid satisfies the court that the tenant has no right of property or beneficial interest in the goods and that such goods are the property or in lawful possession of such other person aforesaid."

It was submitted that to have the distrained goods released the receiver and manager must satisfy the statutory conditions for relief laid down in section 10(1)(c) and section 10(2) and that he could not do so in this case for two reasons. First, it was alleged that by virtue of the floating charges created by the debentures, the tenancy agreement was itself charged in favour of the debenture holders, and accordingly the receiver and manager appointed by them fell within the terms of section 10(1)(c) as "a person ... having a beneficial interest in the tenancy" and was therefore excluded from relief under that section. I am unable to accept this submission. The appointment of a receiver and manager does not effect any change in the tenancy. The tenancy remains vested in the company. In my judgment neither the debenture holders nor the receiver and manager have a beneficial interest in the tenancy within the meaning of section 10(1)(c) of the Act.

The second reason put forward was that for the goods to be released from distress the receiver and manager must satisfy the court, under section 10(2) of the Distress Act, that the tenant (the company) had no right of property or beneficial interest in the goods seized. It was contended that the goods were charged to the debenture holders; that the company under mortgage law retained an equity of redemption in the goods; that the equity of redemption was a beneficial interest retained by the company and that therefore the debenture holders and the receiver and manager appointed by them were unable to comply with the provisions of section 10(2) of the Act. In my judgment, this submission also fails. When the receiver and manager was appointed by the debenture holders, the floating charge became fixed or crystallized and all the property covered by the floating charge became the property of the debenture holders. At the date of the distress the said property was in their lawful possession through the receiver and manager appointed by them. Although the receiver and manager in this case was the agent of the company, his possession of the property was that of the debenture holders who appointed him. Under the circumstances the statutory conditions for relief under section 10(2) of the Act were clearly complied with.

For these reasons I hold that, on the facts of this case, the debenture holders have a prior right to the property distrained than the respondents.

Order accordingly.

Solicitors: *Allen & Gledhill; Netto, Low & Pang; Drew & Napier; Lee & Lee.*